No. 80-1003

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner unlawfully interrogated employees about their support for the union.

2. Whether the Board properly found that petitioner unlawfully discharged a supervisor for union activity engaged in when he was a rank and file employee.

3. Whether the unfair labor practice complaint was properly amended.

4. Whether the Board's order directing that an election be held was proper.

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29 C.F.R. 101.18(a)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported. The decision and order of the National Labor Relations Board (B1-B3, C1-C75) are reported at 244 N.L.R.B. No. 106.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1980. The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

The Board, adopting the decision of the Administrative Law Judge, found that petitioner, in reaction to the Union's [1] organizing campaign, violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by coercively interrogating employees about their union activities; by threatening employees with reprisals for engaging in union activities; by requesting an employee to report on the union activities of other employees; and by transferring an employee to a less desirable shift because of his union activities (Pet. App. C50-C53). The Board further found that petitioner violated Section 8(a)(1) of the Act by discharging Supervisor Michael Johnson for union activity he had engaged in while still a non-supervisory employee (Pet. App. C56), and Section 8(a)(3) and (1) of the Act by discharging 17 employees and refusing to hire one employee because of their union activities (Pet. App. C56-C64).

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[1] International Association of Bridge, Structural, and Ornamental Ironworkers, Local Union 413, AFL-CIO.

The Board ordered petitioner, *inter alia*, to offer reinstatement to Supervisor Michael Johnson and each of the employees discriminatorily discharged or refused a job, and to make each of them whole for any earnings lost by reason of the discrimination practiced against them (Pet. App. C67). The Board's order also requires petitioner to give the Union: (1) immediate access to and use of its bulletin boards and all places where notices to employees are customarily posted, for a three-month period; and (2) a list of the names and addresses of all ironworkers currently employed by petitioner (Pet. App. C70). The order further specifies that, upon a petition by the Union filed not more than 30 days after petitioner's compliance with the Board's order, the Board will conduct a representation election among the ironworkers at the site involved herein, without requiring the normal showing of authorization cards signed by at least 30 percent of the ironworkers at that site (Pet. App. C71).

The court of appeals, in an unpublished *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. A1-A4).

In this Court, petitioner contests the Board's findings that it unlawfully interrogated employees concerning the signing of union authorization cards and that it unlawfully discharged Supervisor Michael Johnson. Petitioner further contends that the unfair labor practice complaint regarding discharges of six employees was time-barred and that the Board improperly ordered an election to be held without requiring the customary showing of interest by the Union.

1. In early 1976, the Union decided to attempt to organize the ironworkers at petitioner's Sumner Nu-

clear Station and Fairfield Pump Storage projects near Jenkinsville, South Carolina (Pet. App. C4-C5). Thereafter, a number of union members and officers sought work at those sites. The Union established an organizing committee at the sites consisting of about 20 individuals, some of whom were employed as foremen (Pet. App. C5). The committee members started soliciting authorization cards from the employees in early May (*ibid.*).

Petitioner became aware of the Union's drive by late May (Pet. App. C6; A. 564-565).[2] Its attorneys immediately sent Employee Relations Manager Emmerson Johnson to Jenkinsville "[t]o help assess the situation to see how deep the Union had got in" and to ascertain the identity of the employees who had signed cards (Pet. App. C7; A. 599, 600). Petitioner's supervisors were instructed to report at once all union activity observed so that it could be "take[n] care of" (Pet. App. C7; A. 286, 289-290, 302, 310-311).

In late May, petitioner began to call individual employees to the Sumner Station personnel office for interrogation, ostensibly to determine the extent of supervisory participation in the Union's campaign (Pet. App. C-8; A. 268-270, 603, 727). The questioning was conducted by Personnel Administrator Walker, Employee Relations Manager Johnson, and Personnel Officer Gary Pace (Pet. App. C-8; A. 727-728). Petitioner's attorneys had given cards to these people to instruct them how to conduct the interviews and to ask the following questions (Pet. App. C9; A. 601, 727-728, 875):

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[2] "A." refers to the printed appendix in the court of appeals. Citations to the record are taken from the government's brief in the court of appeals.

1. Did any supervisor ask or attempt to persuade you to sign a union card?
(If "no," end the interview.)
2. What was said to you?
3. Did you sign a card?

Approximately 200 employees at Sumner were interviewed by mid-July (A. 605, 728).

Some employees were asked questions other than those listed on the interviewers' cards. Thus, Wilbur Keith Queen was asked if anyone (not just a supervisor) had pressured him to sign a card and whether he had seen anyone soliciting cards on the job (Pet. App. C8; A. 509-510). He was not asked whether any supervisor had urged him to sign (Pet. App. C8; A. 509, 521). John Jaynes was asked if he had signed a card and whether he knew the man who was distributing them. Jaynes admitted executing a card, but denied knowledge of the solicitor's identity. (Pet. App. C-8; A. 254, 263.) The interviewer told Jaynes that Sumner would not be a union job (Pet. App. C8; A. 254, 264). Roy Collins was asked where he obtained his card, in addition to whether he received it from a supervisor (Pet. App. C8; A. 268-269, 278-279, 280). Starks Porter was asked if anyone had pressured him to sign (Pet. App. C8; A. 491-492, 503-504). Olin White was asked whether he had been solicited to sign a card by anyone, whether the solicitor was a supervisor or a journeyman, and if he knew anyone who had signed a card (Pet. App. C8-C9; A. 404-405).

In late May and early June, petitioner discharged several of its supervisory personnel who had engaged in activity on behalf of the Union (Pet. App. C9-C13). Foreman Michael Johnson was one of those

terminated, even though he had not participated in union activity while a supervisor (Pet. App. C13). Johnson was initially hired as a journeyman ironworker in December 1975. He solicited authorization cards as a member of the Union's organizing committee and participated in other union activities until he was made a foreman on May 28, 1976. (Pet. App. C13; A. 372-373, 378.) All of the cards submitted as evidence and bearing his signature as a witness were dated between May 11 and May 19 (Pet. App. C13; A. 853-867).

On June 7, Johnson was terminated for "union activity" (Pet. App. C14). On June 11, petitioner obtained a statement from employee Darrell Wright. That affidavit, which contained only one reference to time, stated, "On a Tuesday right after the safety meeting a couple of weeks ago, * * * Mike Johnson asked me to sign a card. * * * Two or three days later * * * he asked me if I wanted to sign a card" (Pet. App. C13-C14 n.14; A. 839). Site Personnel Administrator Walker, who took Wright's statement, made no attempt to establish the exact date that Johnson spoke with Wright about a card. Petitioner neither talked to Johnson regarding this matter before discharging him nor attempted to find out whether he had solicited any cards or participated in any other union activities after he was promoted. (Pet. App. C13-C14 n.14; A. 377, 742-743.)

2. In finding petitioner's interrogations concerning the signing of authorization cards to be unlawful, the Administrative Law Judge rejected petitioner's assertion that its questioning was permissible in order to ascertain the scope of supervisory participation in the solicitation of cards (Pet. App. C50-C51):

> [I]n at least some of the interviews, [petitioner] failed to inform the employees of the purpose of its questions, or failed to confine its questions to the involvement of supervisors in the organizational activities. Moreover, [petitioner's] printed questions were too far, asking the employees whether they had signed a card. * * * [T]he questioning occurred in the context of hostility to union activities, began prior to the filing of the representation petition and continued long after the union activists among the supervisors were discovered and discharged. Thus, while [petitioner] may have had some legitimate purpose in card solicitations inquiry, arising out of the supervisory participation in card solicitations and the filing of the petition, I find that it went beyond the permissible scope of such an inquiry.

In addition, while agreeing with petitioner that it did not violate the Act by discharging supervisors who engaged in union activity (Pet. App. C54-C56), the Administrative Law Judge found that Michael Johnson's situation was different from that of the other supervisors (*id.* at C56):

> Johnson engaged in no union activity subsequent to his assumption of a supervisory position. His union activity occurred while he was still an employee and under the Act's protection. That protection must continue after he becomes a supervisor or it is rendered nugatory. Moreover, it could not help but discourage employee union activity to observe retribution being visited upon a supervisor for the protected activity engaged in while an employee, particularly where, as here, employees move freely and frequently from rank and file jobs to supervisory positions.

The Administrative Law Judge also rejected petitioner's contention that an amendment to the com-

plaint to include the unlawful discharge of additional employees was time-barred under Section 10(b) of the Act[3] (Pet. App. C4):

> The law is clear that "* * * an amended charge, although filed more than 6 months after the occurrence of the unfair labor practice, will be timely if it relates to the unfair labor practice inherent in or connected with the original charge." * * * The amendments name the employees discharged in the course of a single organizational campaign. As such, it is clear that they relate to the "unfair labor practice inherent in or connected with the original charge." [Citation omitted.]

Finally, in fashioning relief, the Administrative Law Judge rejected the General Counsel's request for a bargaining order (Pet. App. C68-C70). However, he did find that certain extraordinary measures were necessary "to dissipate the effects of [petitioner's] flagrant unfair labor practices and to assure that each employee is aware that he may exercise his statutory rights freely" (*id.* at C70). Among these

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[3] The original charge was filed on August 12, 1976, alleging that petitioner violated Section 8(a)(1) and (3) of the Act by discharging 15 named individuals on May 25 "and continuing to date" in order to discourage union activity (Pet. App. C3-C4). The charge also alleged that "[b]y these *and other acts*" petitioner had interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act (Pet. App. C4 n.3; emphasis added). Subsequent amendments to the charge on September 13, 1976, January 13, February 9 and 18, and March 8, 1977, retained identical language and added (or deleted) names on the list of discharged employees. Although petitioner contended before the Board that the allegations concerning 14 employees were time-barred (Pet. App. C3 n.2), it confined this contention in the court of appeals to six employees (*id.* at A3).

measures was the provision that an election be held without requiring the Union to make the customary showing of employee interest.[4] The Administrative Law Judge explained that this measure was appropriate because petitioner's unfair labor practices "may have made it impossible for the Union to obtain [the usual] designations from 30 percent of the employees * * *" (*id.* at C71).

3. The court of appeals affirmed and enforced the Board's order in all respects (Pet. App. A1-A4). The court found that "the ALJ's findings [on the unfair labor practice charges] are amply supported by substantial evidence" (*id.* at A3). It further determined that the "alleged offenses affecting the six individuals added by amendment [to the complaint] were clearly related to the substance and pattern of misconduct claimed in the original charge, so the Board acted properly in allowing the amendments" (*ibid.*). Finally, the court concluded that "[t]he several remedies ordered by the Board fell well within the Board's remedial powers" and, in particular, that the customary standard of a 30% showing of interest involves "an administrative decision not properly subject to judicial review" (*id.* at A4).

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[4] On June 2, 1976, the Union filed a petition seeking a representation election at the Sumner Nuclear Station in a bargaining unit consisting of all journeymen and apprentice ironworkers (Pet. App. C5-C6). The Union also mailed a demand for recognition to petitioner's corporate headquarters. On June 7, the Company's attorneys rejected that demand. (Pet. App. C6; A. 844.) On June 18, the Board conducted a hearing on the Union's petition and subsequently advised the Union that it needed 12 more authorization cards in order to satisfy the 30% showing of interest normally required to obtain an election (Pet. App. C6; A. 107-108). The Union was unable to secure the additional cards. As a consequence, the Board dismissed the petition on July 8, 1976 (Pet. App. C6).

ARGUMENT

The decision of the court of apeals is correct, turns on the particular facts of this case, and does not conflict with any decisions of this Court or of the other courts of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 21-24) that its interrogation of employees concerning their signing of authorization cards was lawful because the questioning had a legitimate purpose, petitioner gave assurances against reprisals, and employee cooperation was voluntary, and that in any event no intimidation was shown. This contention merely challenges the Board's contrary factual findings that were sustained by the court of appeals and thus raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). At all events, the Board's findings are supported by substantial evidence. First, intimidation was proven here. As discussed above (see pages 3-6, *supra*), the interrogations were conducted in a "context of hostility to union activities" (Pet. App. C50) at a time when employees were being discharged for participating in union activities. Furthermore, the Board determined that petitioner exceeded the bounds of legitimate inquiry because it did not restrict its questioning to supervisory participation in the Union's campaign, it expressly asked employees whether they had signed authorization cards, and it continued its investigation after the Union's election petition had been withdrawn.[6]

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[6] *NLRB* v. *P.B.&S. Chemical Co.*, 567 F.2d 1263 (4th Cir. 1977), upon which petitioner relies (Pet. 21-23), is not in conflict, for the court in that case found no atmosphere of

2. Petitioner asserts (Pet. 11-13) that it discharged Johnson for engaging in union activities conducted while he was a supervisor. However, the Board's finding, upheld by the court of appeals, was that Johnson's union activities ceased when he became a supervisor and that petitioner had no good-faith basis for believing otherwise.[6] Again, petitioner's assertion raises only a factual issue that does not warrant further review.

3. Similarly, petitioner's contention (Pet. 14-17) that the complaint was improperly amended merely disputes the Board's finding, affirmed by the court of appeals, that the discharges of the six employees that were thereby added to the complaint related to the unfair labor practices alleged in the original charge.[7]

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intimidation. In any event, a claim of intra-circuit conflict would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[6] The Administrative Law Judge specifically concluded (Pet. App. C13) that "there is no probative evidence to contradict [Johnson's] testimony" that he had not engaged in union activity after his promotion. In particular, the Administrative Law Judge found (*id.* at C13-C14 n.14) that the affidavit assertedly relied on by petitioner (Pet. 12), which was obtained *subsequent* to Johnson's discharge, did not establish that Johnson had participated in union activity after he became a supervisor.

[7] Petitioner concedes (Pet. 14), on the basis of *NLRB* v. *Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952), aff'd sub nom. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 34 n.30 (1954), that a complaint may properly be amended to include events that occurred more than six months before the date of the amendment if the new charge relates back to the original charge. However, petitioner incorrectly asserts (Pet. 15-16) that the *Gaynor* rule applies only where the facts are identical. On the contrary, *Gaynor* has been applied to situations where, as here, the new charges involved additional allegations of

All of the affected employees were discharged for participating in a single union organizing campaign. The court of appeals thus properly concluded that the unfair labor practices involving these six individuals were "clearly related to the substance and pattern of misconduct claimed in the original charge" (Pet. App. A3).

4. Finally, there is no merit to petitioner's contention (Pet. 17-21) that the Board improperly ordered an election without requiring the Union to secure authorization cards from 30% of the employees. The Board has established the 30% criterion for its own administrative purposes in determining whether there is "a question of representation" under Section 9(c) of the Act, 29 U.S.C. 159(c). As the court of appeals correctly held (Pet. App. A4), "a 'showing of interest' is an administrative decision not properly subject to judicial review." See also, *e.g.*, *NLRB* v. *P.A.F. Equipment Co.*, 528 F.2d 286, 287 (10th Cir. 1976); *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 250 (5th Cir. 1964).

In any event, the Board's regulations expressly provide that the 30% standard can be waived when the Board determines that "special factors" exist. See 29 C.F.R. 101.18(a) (Pet. 5). Here, the Board properly concluded that petitioner's extensive misconduct had made it impossible for the Union to obtain the authorization cards normally required to secure an elec-

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unlawful discharges. *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952); *Exber, Inc.* v. *NLRB*, 390 F.2d 127, 129 (9th Cir. 1968). See also *NLRB* v. *Fant Milling Co.*, 360 U.S. 301 (1959).

tion. See *Loray Corp.*, 184 N.L.R.B. 557 (1970).[8] Moreover, allowing the ironworkers at Sumner to cast secret ballots in a fair election, free from the fear of reprisals by petitioner, will finally determine whether a majority of those employees want union representation. The Board's decision to afford them that opportunity is well within its broad discretion to fashion remedies for unfair labor practices. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

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[8] The Administrative Law Judge expressly found that petitioner's "unfair labor practices were, indeed, outrageous and pervasive" (Pet. App. C68) and that its violations were "flagrant" (*id.* at C70). In adopting the Administrative Law Judge's decision, the Board reiterated that petitioner's unfair labor practices were "massive and pervasive" (*id.* at B2 n.2) and that it had "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights" (*id.* at B3 n.3, quoting *Hickmott Foods, Inc.*, 242 N.L.R.B. No. 177 (1979)). And, as the court of appeals held (Pet. App. A3), these findings "are amply supported by substantial evidence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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